IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 63403-8-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
MICHAEL DAVID ROE,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: April 19, 2010

Lau, J. — Michael Roe challenges his convictions for first and second degree incest. He contends his counsel was ineffective for eliciting allegations of a second penetration on cross-examination. But because this was part of a legitimate trial strategy to impeach the witness's credibility, it does not constitute ineffective assistance of counsel. Roe also argues that the trial court should have given the jury a unanimity instruction to ensure they agreed on which of the alleged penetrations occurred. But because Roe's actions show a continuous course of conduct, a unanimity instruction was not required. Finally, Roe challenges several of his community custody conditions. We agree that the conditions were improper. We affirm the convictions but remand to strike the conditions.

FACTS

The State charged Michael Roe with one count of first degree incest and one

count of second degree incest based on his conduct toward H.M., his 16-year-old stepdaughter. At Roe's jury trial, H.M. testified that Roe came home late from work on the evening of June 19, 2008. She was downstairs working on a computer while her sister and mother were upstairs. Roe told her that one of his friends complimented her for being a good kid. She testified that Roe then turned her chair around and pulled her onto his lap. According to H.M., Roe rubbed her rib cage with his knuckles and said she was skinny. Jokingly, she responded that she was fat. At that point, Roe grabbed her right breast and said, "This is just fat, but it's a good fat, don't worry." Report of Proceedings (Feb. 24, 2009) (1RP) at 12. H.M. testified that she "felt really weird[ed] out, so I took his hand off and said good night, and I went upstairs." 1RP at 13

The next morning H.M. awoke to find Roe laying in her bed. She testified that he started to massage her back and removed her shirt and bra by pushing them over her shoulders. H.M. said she was scared because he had never done that before. She testified that a few minutes later, Roe pulled down her underwear and asked if she had ever had a "hard core ass massage." 1RP at 18. He proceeded to massage her buttocks and legs for several minutes. H.M. testified that "in one big motion" his hands went up her legs and he touched her vagina on "the inside" with his finger. 1RP at 22. H.M. testified that Roe knelt next to her and asked her if she had ever masturbated before and when she said no, he asked if she wanted to try. At that point, H.M. said she grabbed her shorts and ran into her sister's room. She testified that Roe followed her and asked her sister to leave. When they were alone, she said Roe put his arm

around her and told her he was sorry and that he was just "messing around." 1RP at 27. She claimed he also told her that she should not tell her mother because it was an accident.

That evening, H.M. told her mother what happened. Her mother confronted Roe and called the police. Roe gave the police a written statement in which he admitted to rubbing up against H.M.'s vagina during the massage. But he claimed it was an accident and that he "didn't mean it that way and by no means meant it to be sexual in any way shape or form." State's Ex. 12.

On cross-examining H.M., defense counsel asked her about a prior interview in which she accused Roe of penetrating her vagina twice.

> Now, on February 4th in that interview, about this, the 20th, the day of "the touch," you said that he actually touched your vagina twice. Do you remember telling us that?
>
> A. Yes.
>
> Q. Okay. But that's not what you either put in that statement nor told your sister, am I correct? You didn't say there were two touches, then?
>
> A. No.
>
> Q. Okay. And when asked when [Roe]'s fingers that penetrated your vagina, you said it was during both touches?
>
> A. Yes.
>
> Q. Okay. But this morning in your testimony [the prosecutor] was eliciting, you didn't say that he touched you twice, you said he touched you and it was then when you grabbed your things and ran into your sister's room. So, now were there two touches or just one touch?
>
> A. There were two because if I ever—then he asked me if I ever masturbated, and then he touched me again.
>
> Q. Okay. So then, you are saying today that there were two touches after all?
>
> A. Yes.
>
> Q. Okay. But the first time that anyone heard about the two touches was on February the 4th at that defense interview, am I correct?
>
> A. Yes.

1RP at 63–64. On redirect, the prosecutor clarified the second touch happened right before H.M. ran out of the room and that it involved "an insertion into [her] vagina." 1RP at 68–69.

The jury convicted Roe as charged. He appeals.

ANALYSIS

Ineffective Assistance

Roe claims he received ineffective assistance of counsel based on his attorney's cross-examination of H.M. To demonstrate ineffective assistance of counsel, Roe must satisfy both prongs of a two-prong test. See State v. McFarland, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995). First, Roe must establish that his counsel's representation was deficient. State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). To show deficient performance, he has the "heavy burden of showing that his attorneys 'made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment . . . .'" State v. Howland, 66 Wn. App. 586, 594, 832 P.2d 1339 (1992) (quoting Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). His attorney's conduct must have fallen below an objective standard of reasonableness considering all the circumstances. State v. Meckelson, 133 Wn. App. 431, 436, 135 P.3d 991 (2006). Matters that go to trial strategy or tactics do not show deficient performance, so Roe bears the burden of establishing there were no legitimate strategic or tactical reasons behind his attorney's choices. State v. Rainey, 107 Wn. App. 129, 135–36, 28 P.3d 10 (2001). Second, Roe must show that his attorney's deficient performance resulted in

prejudice such that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." Hendrickson, 129 Wn.2d at 78. There is a strong presumption that counsel's representation was effective. McFarland, 127 Wn.2d at 335.

Roe argues that his attorney should not have asked H.M. about her previous statement that Roe touched her vagina twice, rather than the one time she testified about on direct examination. He contends that "there was no benefit to be gained by impeaching her on this point." Appellant's Br. at 11. But the defense strategy was designed to impeach H.M's credibility generally. Roe's attorney elicited from H.M. that she and Roe had had a rocky relationship, she had difficulty concentrating due to attention deficit disorder, and she sometimes "fibbed" about things. The attorney also sought to undermine H.M.'s credibility by pointing out that she had told different versions of the event at different times. For example, he emphasized that she originally claimed that Roe positioned her on the bed, but later testified that she turned herself facedown on the bed. The attorney's decision to ask her about a previous inconsistent statement she had made about the number of times Roe touched her was part of this strategy. Because the decision to ask this question was a legitimate strategic choice, Roe fails to show his attorney's performance was deficient.

Additionally, Roe fails to establish a reasonable probability that the result of the trial would have been different if his attorney had not asked about the second touch. Roe admitted to touching H.M.'s vagina during the massage. And though he claimed it was an "accident," he did not dispute H.M.'s testimony that he intentionally removed her

clothing as he was giving her a "hard core ass massage" or that he asked her if she wanted to try masturbation. Based on the record in this case, there is not a reasonable probability that the jury would have believed Roe's claim that the touch was an "accident" even in the absence of testimony that it occurred twice. In any event, the State was not required to prove the touch was purposeful, only that there was penetration—however slight—of H.M.'s vagina. Because Roe fails to show deficient performance or prejudice, his ineffective assistance claim fails.

Unanimity Instruction

Roe next contends his right to a unanimous jury verdict was violated because the trial court did not instruct the jury that they would need to agree on at least one of the two penetrations H.M. described before convicting him of first degree incest. When the State presents evidence of several distinct criminal acts that could form the basis of one charged count, it must either elect the act on which it will rely for conviction or the court must instruct the jury to unanimously agree on a specific criminal act beyond a reasonable doubt. State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). The failure to elect or give a unanimity instruction is a constitutional error that may be raised for the first time on appeal. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988).

But these requirements do not arise when the evidence demonstrates a continuous course of conduct. Petrich, 101 Wn.2d at 571. "Under the 'continuous conduct' exception, the jury must be unanimous only that the continuous conduct occurred." State v. York, 152 Wn. App. 92, 96, 216 P.3d 436 (2009). To assess

whether there is a continuing course of conduct, we evaluate the facts in a commonsense manner considering (1) the time separating the criminal acts and (2) whether the criminal acts involved the same parties, the same location, and the same ultimate purpose. State v. Love, 80 Wn. App. 357, 361, 908 P.2d 395 (1996). For example, in State v. Crane, 116 Wn.2d, 315, 326, 804 P.2d 10 (1991), our Supreme Court concluded that a unanimity instruction was unnecessary because several assaults over a two-hour period constituted "continuous conduct."

Under a commonsense evaluation of the facts here, Roe's alleged criminal actions show a continuous course of conduct. Both penetrations occurred within seconds or minutes of each other during the same massage. They occurred at the same location—on H.M.'s bed. And they involved the same aggressor and victim. Under these circumstances, a unanimity instruction was not required.

Community Custody Conditions

Roe also objects to several of his community custody conditions, arguing that they are not statutorily authorized. In particular, he challenges condition 2, which requires that he pay the costs of H.M.'s crime-related counseling and medical treatment; condition 12, which prohibits him from possessing or consuming alcohol or frequenting establishments where alcohol is the chief commodity for sale; and condition 9, which prohibits him from possessing or controlling any item designed or used to entertain, attract, or lure children. We review whether the trial court had statutory authority to impose community custody conditions de novo. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

Former RCW 9.94A.715(2), .700(4), and .700(5) (2008) authorized the court to impose numerous conditions on Roe's community custody.[1] But none of these provisions authorized the court to require Roe to pay the costs of H.M.'s counseling and medical bills. Such costs can be imposed as part of a restitution order under RCW 9.904A.753(3), but there was no restitution hearing here. We accept the State's concession of error and remand to strike this condition.

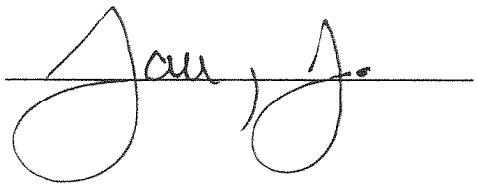
Under RCW 9.94A.700(5)(d), a sentencing court may order an offender to refrain from consuming alcohol. Such a condition is authorized regardless of whether alcohol contributed to the offense. State v. Jones, 118 Wn. App. 199, 207, 76 P.3d 258 (2003). Consequently, the portion of condition 12 that prohibits Roe from consuming alcohol is proper. But the only possible authority for the remainder of the condition is RCW 9.94A.700(5)(e), which authorizes the court to impose crime-related prohibitions. A "crime-related prohibition" is "an order of the court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(13). Here, there was no evidence that alcohol played any role in contributing to Roe's offenses. Consequently, as the State concedes, the remainder of condition 12, pertaining to possessing alcohol and frequenting businesses that sell alcohol, must be stricken.

Roe also challenges the condition that he not possess any item designed to entertain, attract, or lure children. He argues that there was no evidence he possessed

[1] Any sentence imposed under the authority of the Sentencing Reform Act must be in accordance with the law in effect at the time the offense was committed. RCW 9.94A.345. The offenses here occurred on June 19 and 20, 2008.

any such items or that they contributed in any way to his crime. We agree. The condition is not related to the circumstances here and must be stricken on remand.

We affirm Roe's convictions but remand to strike the unauthorized community custody conditions.



WE CONCUR: